

April 11, 2014

Steve Boyle
District Superintendent
Escondido Union High School District
302 North Midway Drive
Escondido, CA 92027-2741

Re: Your Request for Advice
Our File No. A-14-037

Dear Mr. Boyle:

This letter responds to your request for advice on behalf of Michael Simonson, the Escondido Union High School District's Assistant Superintendent for Business Services, regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict of-interest laws such as common law conflicts of interest, incompatible activities, the Education Code or your agency ethic's policies. In addition, although we also may provide advice on Government Code Section 1090, which is a provision outside the Act applying to conflicts of interest in government contracts, as stated below, you present no facts at this point that give rise to an issue under Section 1090. Finally, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

QUESTION

Mr. Simonson is engaged to be married to an employee of McGregor & Associates, Inc. (hereafter "McGregor"). Once they are married, will Mr. Simonson's spouse's compensation from McGregor give rise to a conflict of interest under the Act in his decisions as Assistant Superintendent for Business Services at the Escondido Union High School District (the "District")?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

According to your facts, the Assistant Superintendant will have a conflict of interest in any District decision only if the decision will have a material financial effect on McGregor. Assuming McGregor is a relatively small business that is not publically traded, a financial effect would be material if it increases or decreases McGregor's gross revenues for a fiscal year in the amount of \$20,000 or more or its expenses by \$5,000 or more, or, will increase or decrease the value of its assets or liabilities by \$20,000 or more. It does not appear from these specific facts that Mr. Simonson will have a conflict of interest when carrying out the official duties that you have described.

FACTS

Mr. Simonson supervises the District's employee benefits department and is kept informed regarding District communications with the Southern California Schools Voluntary' Employees Benefit Association ("VEBA"). VEBA is a joint employer-employee trust and is a non-profit corporation. VEBA provides health and welfare benefits for employees of the District and other public school districts. Participation in VEBA requires agreement between a school district governing board and its unions. VEBA is governed by a non-compensated board of directors comprised of appointed directors from school district management and labor organizations.

In 1996, the District's governing board entered into an agreement with VEBA. Participation in VEBA is embodied in a written Participation Agreement (the "Agreement") that is between the directors of VEBA and a school district and a union.² Under the terms of the Agreement, the District's contract with VEBA automatically renews if the District does not provide proper and timely notice of termination. The District's governing board does not take action annually; action would only be taken if a decision was made to no longer participate in VEBA. Collective bargaining rules require that the District reach agreement with its unions if it no longer wishes to participate in VEBA.

Individual school district rates for health and welfare benefits are determined by VEBA. VEBA's board of directors controls the health and welfare benefit options that are offered to participating school districts. Individual school districts are not permitted to engage directly in negotiations with VEBA regarding packages of benefits. VEBA contracts with two private nonprofit businesses to assist in performing its duties:

- Towers Watson does the underwriting and determines the annual rates that will be forwarded to member school districts.

² In your voice message of April 8, 2014, you noted that the contract with VEBA was made eight to ten years before Mr. Simonson was hired by the District.

- McGregor provides technical advice and administrative services to VEBA. McGregor has 42 employees.

Mr. Simonson is engaged to be married to an employee of McGregor. She has been employed by McGregor since March of 2010. Her current responsibilities include problem resolution, communications, member issues and the presentation of new and relevant materials to school districts' staff. She does not hold any ownership interest in McGregor, and does not earn bonuses. She receives a salary of \$60,000 per year. She may earn commissions based upon retirees who enroll directly with VEBA for Medicare plans. However, the District does not offer such plans and has no retirees enrolled in these types of plans. Mr. Simonson's fiancée's compensation from McGregor is not affected in any way by the District's participation in VEBA.

Finally, according to Mr. Simonson's Job Description, he serves as the high school district's Chief Business Official. In that capacity, he plans organizes, directs, supervises and reviews the activities of the district's Business Services Division in accordance with Board of Education standards by performing the following duties personally or through subordinate supervisors:

- Develops and monitors district budget;
- Directs and supervises, through the Director of Maintenance & Operations, the general upkeep and maintenance of schools, equipment, and grounds;
- Directs and supervises, through the Director of Transportation, the safe transportation of pupils and the use of district transportation facilities;
- Directs and supervises, through the Director of Purchasing, the district's purchasing and warehousing operation;
- Directs and supervises, through the Director of Business Support Services, the Student Nutrition and Risk Management programs, including Workers' Compensation, for the district;
- Directs and supervises, through the Manager of Information Systems, the planning, installation and maintenance of technology throughout the district;
- Directs and supervises the planning, construction and/or remodeling of school plants;
- Develops, reviews and enforces Board Policies pertaining to Business Operations, making recommendations for revision and adoption to the Superintendent for approval by the Board of Trustees;
- Makes financial forecasts and prepares reports, analyses and recommendations;

- Confers with and advises site administrators and others regarding school business matters;
- Analyzes P-1 and P-2 reports, and assists Assistant Superintendent of Human Resources in determining staffing allocations, based on enrollment projections, ADA and student detention rates and in compliance with collective bargaining agreement(s);
- Represents the district in a wide variety of meetings, including state, county, city and other public and private forums;
- Attends and participates in Board meetings, closed sessions, Cabinet meetings and other meetings as directed by the Superintendent.

ANALYSIS

The primary purpose of the Act's conflict of interest provisions is to ensure that "public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) In furtherance of this goal, Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Determining whether a conflict of interest exists under Section 87100 is an eight-step process as outlined below.³

Steps One and Two: Is Mr. Simonson a "public official" making, participating in making, or influencing a governmental decision?

The Act's conflict of interest provisions apply only to "public officials." (Section 87100, 87103; Regulation 18700(b)(1).) "Public official" is defined as "every member, officer, employee or consultant of a state or local government agency...." (Section 82048.) As the District's Assistant Superintendent for Business Services, Mr. Simonson is a public official.

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (See Regulation 18702.1.) A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises or makes recommendations to the decision maker regarding the governmental decision. (Regulation 18702.2.) A public official is

³ Note that application of the conflict of interest provisions of the Act is dependent on the facts of each particular decision. Thus, you and the assistant supervisor must apply the rules set forth in this letter on a decision-by-decision basis and may wish to seek further advice as specific decisions arise.

attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Your question concerns governmental decisions in which Mr. Simonson may participate in his official capacity.

Step Three: What are Mr. Simonson's interests -- the possible sources of a conflict of interest?

Section 87103 provides that a public official has a "financial interest" in a governmental decision "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on any of the official's interests. Mr. Simonson's interests that are pertinent to this question are set forth in Section 87103(c).⁴

"A public official has an interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision" (Section 87103(c); Regulation 18703.3). "Income" means "a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage, loan, forgiveness or payment of indebtedness received by the filer, reimbursement for expenses, per diem, or contribution to an insurance or pension program paid by any person other than an employer, and including any *community property* interest in the income of a spouse." (Section 82030(a).) Thus, Mr. Simonson has an interest in his community property share of the income his spouse receives from McGregor.⁵

Step Four: Are Mr. Simonson's interests directly or indirectly involved in the governmental decision?

The fourth step in analyzing a potential conflict of interest is to determine whether the public official's interest is directly or indirectly involved in the governmental decision at issue. (Regulation 18700(b)(4).) This step is important because it determines which test for materiality to use in deciding whether it is reasonably foreseeable that the governmental decision will have a

⁴ A public official always has an interest in his or her personal finances. A governmental decision will have an effect on this interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Section 87103; Regulation 18703.5.) You stated that nothing the Assistant Superintendant participates in will affect his spouse's compensation from McGregor. Thus, we do not further analyze financial effects on personal finances.

⁵ Section 82030 also provides: "Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater." You noted that Mr. Simonson's spouse has no ownership interest in McGregor & Associates, Inc. Therefore, this portion of Section 82030 is not applicable, and income to McGregor's clients is not considered income to Mr. Simonson.

material financial effect on the interest. Obviously, the application of this step will depend on the specific facts of a particular decision.

A source of income is directly involved in a decision before an official's agency when that person or entity, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

It would seem from your facts that McGregor, while working for VEBA in a representative capacity, would not be a named party in any future decisions of the District. However, if they are an applicant or named party in their own right in the future, you should contact us for further advice. A source of income that is not directly involved in the decision is considered indirectly involved. Under the facts provided, McGregor would be indirectly involved. (Regulation 18704(a).)

Steps Five and Six: What is the applicable materiality standard and is it reasonably foreseeable that the materiality standard will be met?

If McGregor is indirectly involved in decisions, the standards in Regulation 18705.1(c) apply. For example, assuming McGregor is a relatively small business that is not publically traded, a financial effect on McGregor is considered material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Once a public official has determined the materiality standard applicable to each of his or her interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an interest need not be certain or even substantially

likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

None of the decisions you are asking about appear to foreseeably meet these thresholds. Based on your facts and your description of the official duties and job functions of Mr. Simonson, it does not appear that he will have a conflict of interest under the Act carrying out his duties as described.⁶

Section 1090

We have not discussed the potential application of Section 1090, which generally prohibits an official from having an interest in a government contract, to Mr. Simonson. In your voice message of April 8, 2014, you noted that the contract with VEBA was made eight to ten years before Mr. Simonson was hired by the District. We assume for purposes of this letter that Mr. Simonson did not and will not participate in decisions regarding VEBA. Therefore, Section 1090 would not appear to be implicated by your facts.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

⁶ We have not gone on to analyze the latter two steps in the 8-step analysis. Step seven is an exception that applies where the reasonably foreseeable and material financial effect on the official's interest is not distinguishable from the effect on the public generally, and step eight is an exception that applies when the official is legally required to participate in the decision. Since we have concluded that Mr. Simonson has no conflict of interest it is unnecessary to discuss these exceptions.